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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PET, INC.,
Defendant-Appellant-Petitioner,

vs.

ANNA M. BUCKNER,
Plaintiff-Appellee-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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May 18, 1988

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QUESTIONS PRESENTED*

1. Whether an employee covered by a collective bargaining agreement may avoid the preemption principles and policies of private dispute resolution embodied in Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA), and the exclusive, mandatory and binding grievance - arbitration procedures of that agreement, by pursuing a state-law cause of action for workers' compensation retaliatory discharge which collaterally challenges the arbitrator's ruling under the just cause provision of the agreement that good cause existed for the employer's discharge decision because the employee was physically unable to perform her job duties.

2. Whether the Oklahoma Supreme Court has decided important questions of federal preemption and federal labor policy in a way which conflicts with the recent applicable decision of this Court in *Allis-Chalmers v. Lueck,* 471 U.S. 202 (1985), by relying on pre-*Allis-Chalmers* authority and analysis.

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* All parties to the proceedings in the Court below are listed in the caption.

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PET, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PET, INC., respectfully petitions the Court to issue a Writ of Certiorari to the Supreme Court of the State of Oklahoma to review the decision of the State Court affirming the judgment entered against Pet, Inc. upon Plaintiff-Respondent's state law retaliatory discharge action. Petitioner respectfully urges this Court to issue its Writ of Certiorari because this case presents an important variation on the preemption issue currently pending before this Court in *Jonna R. Lingle v. Norge Division of Magic Chef, Inc.*, No. 87-259 (Argued and Submitted March 23, 1988). Alternatively, Respondent submits this Court should grant the Petition, vacate the lower court judgment and remand this cause for reconsideration in light of the *Lingle v. Norge* decision when issued.

OPINIONS BELOW

The decision of the Court of Appeals of the State of Oklahoma designated not for publication is set forth at pages A-1 to A-3 of the Appendix to this Petition. The Order of the Supreme Court of the State of Oklahoma denying Petitioner's Petition For Certiorari, also not a published order, is reprinted at page A-4 of the Appendix to this Petition.

JURISDICTION

The decision of the Court of Appeals of the State of Oklahoma affirming the judgment of the District Court of Grady County, Oklahoma was entered on October 20, 1987. Thereafter, the Supreme Court of the State of Oklahoma entered its Order denying Petitioner's Petition For Certiorari on February 18, 1988. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Okla. Stat. Title 85, §§5-7 (Supp. 1980), provides:

> §5. No person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of Title 85

of the Oklahoma statutes, or has testified or is about to testify in any such proceeding. Provided no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties.

§6. A person, firm, partnership or corporation who violates any provision of Section 5 of this title shall be liable for reasonable damages suffered by an employee as a result of the violation. An employee discharged in violation of the Workers' Compensation Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

§7. The district courts of the state shall have jurisdiction, for cause shown, to restrain violations of this Act.

STATEMENT

A. FACTS

On November 12, 1981, Respondent Anna M. Buckner filed a Petition in the District Court for Grady County, State of Oklahoma, alleging that her employment with Petitioner Pet, Inc. at its Chickasha, Oklahoma plant had been terminated in violation of Okla. Stat. Tit. 85, §§5 and 6 (Supp. 1980) which, *inter alia*, prohibits discharge because of the good faith filing of a workers' compensation claim. Petitioner had terminated Respondent's employment on January 7, 1981 for the reason her health was such that she could not perform any work available at the plant,[1] and Arbitrator Preston J. Moore ruled on November 23, 1981 that Petitioner had good cause for terminating Respondent's employment.

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[1] Okla. Stat. Tit. 85 §5 expressly provides that no employer shall be required to rehire or retain any employee who is determined physically unable to perform his assigned duties.

Respondent's employment relationship with Pet, Inc. was governed by the terms of a collective bargaining agreement entered between the Company and the International Association of Machinists and Aerospace Workers, Local No. 2512. The agreement protected employees against discharge without "good and sufficient cause", and provided a broad, mandatory grievance - arbitration procedure that was to be the exclusive remedy for all disputes. Respondent had invoked the grievance - arbitration mechanism and thereafter commenced the state court action. Before Respondent's initial responsive pleading was filed in the state court action, Arbitrator Moore had ruled Respondent's grievance in favor of Petitioner Pet, Inc.'s contractual right to terminate Respondent under the just cause provision of the contract, finding the Company had just and sufficient cause to terminate Respondent in that the Company is *not* required to retain in employment an employee when the evidence has established that such employee cannot perform any service for the Company without aggravating a previous injury.[2]

B. PROCEEDINGS BELOW

On December 31, 1981, Petitioner filed its Answer to Respondent's state court Petition expressly raising the preemption and exclusivity bars to this action. Petitioner's Motion For Judgment on the Pleadings, wherein the binding effect of the arbitration decision was argued, was denied on January 19, 1982. Thereafter, on November 15, 1982, Petitioner filed its Application For Order Certifying the Question to the Oklahoma Supreme Court because the preemption question had not been ruled previously by that Court. This request was denied on March 15, 1984, and thereafter Petitioner filed its Motion For

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[2] The Arbitrator found that Respondent, who had experienced ten injuries during her employment, continued to experience pain and suffering when assigned to the lightest duty in the plant, making it impossible to continue her in employment.

Summary Judgment on March 19, 1984, arguing the res judicata effect of the Arbitrator's decision upon the state court proceeding. The Motion was denied and, following a two (2) day trial on the issues, the jury rendered its verdict in favor of Respondent on September 14, 1984, awarding her $40,000.00 back pay and $25,000.00 in punitive damages.

On February 11, 1986, the District Court overruled Petitioner's Motion For New Trial, filed September 21, 1984, wherein Petitioner again raised the binding effect of the arbitration decision and the exclusivity of the grievance - arbitration provision of the collective bargaining agreement in addition to the federal law preemption of this state law action.

An appeal was taken to the Court of Appeals of the State of Oklahoma raising again federal preemption and the res judicata effect of the prior arbitration decision. In its opinion dated October 20, 1987, the Court held the Oklahoma Supreme Court's decision in *Dority v. Green Country Castings Corp.*, 727 P.2d 1355 (Okl. 1986), rather than *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985) and the Steelworkers Trilogy[3] was controlling authority in this case and, upon such basis, the judgment of the District Court was affirmed. The Appellate Court stated: "The trial court had the duty to follow the decision of our Supreme Court, and did so. This Court has the duty to follow the decision of our Supreme Court, and we now do so."

Petitioner sought review of this decision to the Supreme Court of the State of Oklahoma on the grounds *Dority v. Green Country Castings Corp.*, 727 P.2d 1355 (Okl. 1986) is neither controlling in the instant case nor does the decision in *Dority* reach all issues raised or correctly decide the question of federal

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[3] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

labor law preemption. By Order filed February 18, 1988 certiorari was denied with six (6) Judges of the Court concurring; one (1) Judge concurring by reason of *stare decisis* and two (2) Judges dissenting.

REASONS FOR GRANTING THE WRIT

This Case Presents An Important Variation On The Issue Of Federal Labor Law Preemption Currently Pending Before The Court In *Jonna R. Lingle v. Norge Division Of Magic Chef, Inc.*, No. 87-259. The Issue Whether An Employee Covered By A Collective Bargaining Agreement May Avoid The Preemption Principles And Policies Of Private Dispute Resolution Embodied In Section 301 Of The Labor Management Relations Act (LMRA), And The Exclusive, Mandatory And Binding Grievance - Arbitration Procedures Of That Agreement, By Pursuing A State Law Workers' Compensation Retaliatory Discharge Action Which Collaterally Challenges The Arbitrator's Ruling That Good Cause Existed For The Employer's Discharge Decision Because The Employee Was Physically Unable To Perform Her Job Duties Is Squarely Presented By This Case.

At issue in *Jonna R. Lingle v. Norge Division of Magic Chef, Inc.*, No. 87-259, is the threshold question whether a state law claim for workers' compensation retaliatory discharge is preempted by Section 301 of the LMRA where the employee is covered by a collective bargaining agreement which provides for discharge only upon just cause. This question whether the state law claim is "inextricably intertwined" with the labor contract within the meaning of *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), requires this Court to determine whether the state law action establishes an independent, non-negotiable right or whether the substantive claim directly implicates the terms and conditions of employment governed by the collective bargaining agreement.

A corollary issue is directly presented by the instant case which may give definition to this Court's analysis in *Jonna R. Lingle v. Norge Division of Magic Chef, Inc.* That is, this case raises the question - where the state workers' compensation statute expressly provides that no employer shall be required to

rehire or retain an employee who is determined physically unable to perform his assigned duties and the Arbitrator has made an express finding under the contract on that question - is not the state law action inextricably dependent upon the terms and conditions of employment governed by the collective bargaining agreement? That is, would it not be necessary for the State Court to look to the terms of the collective bargaining agreement to determine whether the employee has been properly determined unable to perform the assigned duties? If so, what effect does a prior arbitration decision on the question have in such state court proceeding? and can an employee covered by a collective bargaining agreement avoid the preemptive force of the LMRA by litigating the question of physical ability, and just cause for discharge, under the guise of the state law workers' compensation retaliation claim?

The questions presented by this case permit this Court to consider the consequences and reach of its pending decision in *Lingle v. Norge Division of Magic Chef, Inc.* and strongly suggest that state law retaliatory discharge claims necessarily implicate the terms and conditions of employment governed by the collective bargaining agreement and duplicate remedies already exclusively provided for by the agreement.

In the instant case, Respondent has used the Oklahoma Workers' Compensation law to purportedly assert an "independent" state law claim challenging the termination of her employment. However, because the substantive claim directly implicates the terms of employment governed by the collective bargaining agreement, the claim is preempted. At all times during the term of her employment, Respondent was a unionized employee receiving the benefits of the collective bargaining agreement and, indeed, she has invoked the grievance - arbitration mechanism available as a matter of contract to challenge the basis for her discharge. Additionally the agreement explicitly protects Respondent from discharge or discipline except for

just cause.[4] Clearly, the benefits of this contract include a protection against abusive discharge or discrimination, including protection against workers' compensation retaliation.

Nonetheless, only days before the Arbitrator issued his decision that good cause existed for Respondent's discharge, this state law claim was filed and the entire proceeding has involved relitigation of issues already determined in the arbitration proceeding, including the ultimate issue whether Respondent was terminated for just cause because she could not perform any work available at the plant and whether such reason for discharge is equivalent to a finding under Okla. Stat. Tit. 85, §5 that the Respondent was determined physically unable to perform her assigned duties, thereby exempting the employer from the reach of the statute.

Therefore, even if Respondent's claim can be said, in some sense, to be "independent" of the collective bargaining agreement's literal terms, it is not beyond the "whole employment relationship" of Respondent and Petitioner. *Cf. AT&T Technologies, Inc. v. Communications Workers,* 106 S.Ct. 1415, 1419 (1986) (under Section 301, all disputes even "arguably" within the scope of the grievance - arbitration procedures must be submitted thereunder). And, while it is certainly true that this Court in *Lueck* and other cases has stated that "it would be inconsistent with congressional intent under [Sec-

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[4] Article 15, Section A of the collective bargaining agreement provides:

> "No employee shall be discharged without good and sufficient cause."

The Management Rights clause (Article 2) provides, *inter alia,* that the Company's right to discharge for proper cause "will not be used for the purpose of discrimination against any employee" and the Company retains rights "except as modified by applicable Federal and State Law and the terms of the Agreement".

tion 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract," 471 U.S. at 212, it cannot be true that a state court or legislature may gerrymander Section 301's substantive content, and avoid its preemptive force, whenever it sees fit to create "independent" laws and rights which purportedly can be litigated without reference to the collective bargaining agreement. Such a limitless rule would have the inevitable effect not only of eviscerating arbitration and the collective bargaining agreement, but of nullifying - on a state-by-state basis - the private system of industrial self-government envisioned by Congress and this Court's decisions.

There would be nothing to foreclose a state from promulgating rules to govern the most routine of situations now considered "grist in the mills of the arbitrators." *Warrior & Gulf,* 363 U.S. at 584. For example, a state could prescribe the number of employee absences necessary before discharge would be appropriate, the requisite level of insubordination prior to discharge, the significance of repeated absences or tardiness from work, rules governing overtime pay distribution or any other matter. Because the source of these rights was not the labor contract, but "independent" state law, parallel avenues for relief would exist, denigrating free collective bargaining and causing "arbitration to lose most of its effectiveness." *Lueck,* 471 U.S. at 219-20; *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965). "Claims involving vacation or overtime pay, work assignments, *unfair discharge* - in short, the whole range of disputes traditionally resolved through arbitration - could be brought in the first instance [or following arbitration] in state court by a complaint in tort rather than in contract." *Lueck,* 471 U.S. at 219-20 (emphasis added).

The correct approach may be drawn from this Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts,* 471

U.S. 725 (1985), and other decisions.[5] *Metropolitan Life,* for example, considered an analogous preemption question under the National Labor Relations (NLRA), which utilizes a preemption analysis far less expansive than that utilized in Section 301 cases. *See Pilot Life Insurance Co. v. Dedeaux,* 107 S.Ct. 1549, 1557 (1987); *Lueck,* 471 U.S. at 212 n.6; *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 23 (1983). In *Metropolitan Life,* this Court rejected the employer's argument that the NLRA prohibits states from requiring certain mandatory minimum health care benefits to be included in general insurance policies:

> Accordingly, it never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. See, *e.g. Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 737, 739 (1981). Cf. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 51 (1974). Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.

471 U.S. at 755 (emphasis in original). This language suggests the permissible bounds of federal and state interference with the policy of private dispute resolution envisaged by the LMRA. To the extent federal law intrudes, it is a congressional judgment

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[5] *E.g., Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983) (holding that New York pregnancy discrimination law was preempted to the extent purported state regulation encroached in areas of exclusive federal concern under ERISA); *Malone v. White Motor Co.,* 435 U.S. 497 (1978) (pre-ERISA state regulation of pension plans, subject to NLRA - imposed bargaining, permissible where Congress intended states could regulate); *Teamsters v. Oliver,* 358 U.S. 283 (1959) (Ohio antitrust law preempted by NLRA).

that the restrictions imposed on the bargaining process are acceptable or even desirable. State intrusions of a similar nature may therefore be no less acceptable or desirable. Currently enacted federal laws in force at the time of Section 301's enactment, *id.* at 756, suggest the limits of permissible intrusions into the arena of Section 301 and the power of the parties, by contract, to order their own affairs.

There is no federal or previously - existing state analogy to the workers' compensation retaliatory discharge cause of action at issue in this case. It is precisely this type of claim, which is the recent creation of state legislatures and courts expanding, if not transforming, the state law scheme for enforcement of workers' compensation rights, if raised by fully - protected employees such as Respondent, that must be preempted to preserve the policies of free collective bargaining, private dispute resolution and arbitration under the LMRA. Such claims cannot be "independent" of the labor contract and must be deemed to be "inextricably intertwined" with, or "substantially dependent" upon, the contract within the meaning of *Lueck*.

The state workers' compensation laws have been enacted to provide a comprehensive scheme for efficient and expedient delivery of benefits and remedies for injured employees. Because Legislatures (or state courts) have seen fit to secure compliance with these laws by guarding against wrongful discharge for exercise of the workers' compensation remedy for injury, the "retaliatory" or "wrongful" discharge component of the workers' compensation laws cannot be said, under *Lueck*, to create *rights* independent of or separate from the broad range of rights accorded to unionized employees as granted by contract and federal labor law to be free from *all* varieties of abusive or "unjust" discipline or discharge. *See, e.g., Vantine v. Elkhart Glass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985).

While *Allis-Chalmers v. Lueck* makes clear that state law provides no *ancillary* rights or remedies where the cause of action

essentially seeks enforcement of rights derived from or dependent upon collective bargaining agreements, nonetheless in the instant case, the Oklahoma Courts have looked only to *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981), as followed in *Dority v. Green Country Castings Corp.*, 727 P.2d 1355 (Okl. 1986), to decide that Section 301 does not preempt state tort actions to contest retaliatory discharges for filing workers' compensation claims.

The approach adopted by the Oklahoma Courts appears to go well beyond the holdings in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In each of those cases, *express federal* statutory rights were held not supplanted by remedies under collective bargaining agreements. Here, in contrast, Respondent's suit unquestionably seeks a remedy for rights already conferred by the bargaining agreement (discharge only for just cause without discrimination in light of federal and state law, *see* footnote 2, *supra*) and the purported *state* interest as announced in *Dority* of maintaining the integrity of the workers' compensation system to supplant or supplement federal remedies and those available under contract is attenuated at best. Unlike the civil rights/anti-discrimination area analyzed in *Gardner-Denver Co.*, legislative enactments in the labor law area do *not* evince a *general* intent to accord parallel or overlapping remedies against unjust discharge, in the absence of express congressional authorization or clearly discernible intent.

Importantly, the Oklahoma Supreme Court in *Dority v. Green Country Castings Corp.*, 727 P.2d 1355 (Okl. 1986) has not decided as a matter of state law what effect, if any, the arbitrator's finding should have in a state court workers' compen-

sation action, such as the instant case.[6] The Court in *Dority* only looked to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and found the situation presented in *Dority* analogous because of the state interest involved.[7] The Oklahoma Court of appeals in the instant case has made no independent state law analysis of the effect of the arbitrator's finding in this case but instead only cited the *Dority* analysis, which is questionable at best on the collateral estoppel effect of the arbitration award. The Oklahoma Supreme Court by denying the Petition for Certiorari in the instant case and permitting the Court of Appeals decision herein to stand has failed to properly consider the important federal preemption and federal labor law questions presented by this case.

The Oklahoma Supreme Court Has Decided Important Questions Of Federal Preemption And Federal Labor Policy In A Way Which Conflicts With The Decision Of This Court In *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), By Relying On Pre-*Allis-Chalmers* Authority And Analysis.

The Court of Appeals of the State of Oklahoma has rejected Petitioner's reliance on *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), in the instant case and instead has rigidly applied the

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[6] Interestingly, in *Pierce v. Franklin Electric Co.*, 737 P.2d 921 (Okl. 1987) the Oklahoma Supreme Court has held an employer *can* terminate an at-will employee under Okla. Stat. Tit. 85, §§ 5-7 for the *sole* reason the employee is not physically able to perform his job duties. Moreover, the Court recognized the discharge decision in that case was made pursuant to the Company's legitimate personnel policy. Nonetheless, in the instant case, the Court has failed to consider the effect of the Arbitrator's comparable finding under the collective bargaining agreement.

[7] In *Pierce*, the Oklahoma Supreme Court described the principle underlying the workers' compensation scheme as "insurance"; however, in *Dority* the Court identifies the operative state interest as "maintaining the integrity of its workers' compensation system".

Oklahoma Supreme Court's decision in *Dority v. Green Country Castings Corp.*, 727 P.2d 1355 (Okl. 1986), wherein the Oklahoma Supreme Court adopted wholesale the Tenth Circuit's decision in *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1982). By allowing for this rejection of *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985) in its denial of the Petition for Certiorari in this case, the Supreme Court of the State of Oklahoma has decided important questions of federal preemption and federal labor policy in a way which does conflict with the decision of this Court in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). Moreover, the continued vitality of the *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1982), decision is called into question by this Court's consideration of the case of *Jonna R. Lingle v. Norge Division of Magic Chef, Inc.*, No. 87-259.

The Tenth Circuit's decision in *Peabody Galion* predates *Allis-Chalmers* and primarily concerns questions of NLRA preemption, which clearly is more limited than the preemptive force of the LMRA which is applicable to the instant case. Moreover, the Tenth Circuit's analysis of the Oklahoma state statute in *Peabody Galion*, to determine whether the arbitration remedy available therein was exclusive, is questionable insofar as the Court characterizes the workers' compensation statute as a state minimum standard of protection such as the FLSA at issue in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).

In *Dority v. Green Country Castings Corp.*, 727 P.2d 1355 (Okl. 1986), while the Oklahoma Supreme Court paid lip service to this Court's decision in *Allis-Chalmers* by making reference to the case in two perfunctory footnotes concerning the preemptive force of federal law, *see* 727 P.2d 1355, at 1357 n.5 and 6, the court inquired substantively in that case only to NLRA preemption and held, under the questionable *Peabody Galion* analysis, that the Oklahoma workers' compensation statute was not supplanted by the NLRA, and that such supplemental remedies are available under the reasoning applied to *federal*

remedies in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The decision of the Court of Appeals of the State of Oklahoma in this case fails to undertake any analysis of the applicability of *Allis-Chalmers* and its flawed decision is based not on an independent and adequate analysis of the meaning of Okl. Stat. Tit. 85, § 5 or the effect of the Arbitrator's finding but only upon recitation of the *Dority* holding. Because the decision of the Supreme Court of the State of Oklahoma in *Dority* neither addresses all the issues presented by this case nor considers the preemptive effect of the LMRA, the Court has decided important questions of federal preemption and federal labor law in a way which conflicts with *Allis-Chalmers*. By denying the Petition for Certiorari in this case, the Supreme Court of the State of Oklahoma continues to rely on pre-*Allis-Chalmers* authority and analysis to decide important questions of federal labor law preemption in a way which conflicts with this Court's decision in *Allis-Chalmers*.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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May 18, 1988

APPENDIX

APPENDIX A

NOT FOR PUBLICATION
THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

Division No. 1

Case Number 65,989

PET, INC.,
Appellant,

vs.

ANNA BUCKNER,
Appellee.

Appeal From The District Court Of Grady County, Oklahoma
Honorable Oteka Alford, Judge

AFFIRMED

(Filed Oct. 20, 1987)

Rex K. Travis,
Oklahoma City, Oklahoma, For Appellant,

Ben A. Goff,
Oklahoma City, Oklahoma, For Appellee.

Opinion by James P. Garrett, Judge:

Appellee was employed by Appellant for 9 or 10 years. During that time she claimed 10 or 11 job-related injuries. Appellant terminated Appellee's employment for the stated reason that her health was such that she could not perform any work available at the plant.

The employment was covered by a collective bargaining agreement. It included a provision prohibiting discharge except for "good and sufficient cause" and a "grievance and arbitration" agreement. Appellee filed a grievance. It was submitted

to arbitration. The arbitrator found that appellant had good cause for terminating Appellee's employment.

Thereafter, Appellee filed this action against Appellant in State District Court alleging that her dismissal was in retaliation for filing Workers' Compensation claims in violation of 85 O.S. 1981 §§5, 6 and 7. Appellant defended on the grounds (1) that the state court lacked subject matter jurisdiction, since the Federal Labor Management Relations Act (29 U.S.C.A. §185) had preempted state jurisdiction, (2) the arbitration finding was binding, and (3) that the discharge was proper. The trial court rejected the legal defenses and submitted the case to a jury. The jury verdict was for Appellee for $40,000 back wages and $25,000 in punitive damages.

Appellant presents two issues for reversal. First: The trial court was without subject matter jurisdiction because Federal Law has preempted state laws which regulate activity that is also the subject of collective bargaining agreements. See the National Labor Relations Act, §1 et seq., as amended, 29 U.S.C.A. §151 et seq. Second: The arbitration award was final and binding on the parties and should be given res judicata effect so as to bar pursuit of this retaliatory discharge claim under Oklahoma Law.

Appellant cites *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 85 L.Ed.2d 206, 105 S.Ct. 1904 (1985); the "steelworkers trilogy", *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 424 (1960); together with numerous other cases. Appellant contends these cases, particularly *Lueck* and *Steelworkers,* hold that the NLRA preempts state laws where collective bargaining agreements exist, and that the arbitration result is final and binding on the parties.

Appellee cites *Dority v. Green County Castings Corporation,* 727 P.2d 1355 (Okl. 1986) and contends it is controlling authority in this case. We agree.

Dority holds: (1) that the National Labor Relations Act (NLRA) (29 U.S.C.A. §141 et seq.) does not preempt state statutory claims for retaliatory discharge under 85 O.S. 1981 §§5, 6 and 7; and (2) a prior adjudicative decision by the NLRB, which reinstates discharged employees to their jobs and awards them backpay, does not bar their state court retaliatory discharge claims.

In refusing to give res judicata effect to the employees' success in asserting claims against employer before the NLRB, even though the administrative proceedings resulted in award of reinstatement and back pay, the *Dority* court said: ". . . we hold today that an action for damages from retaliatory discharge does not conflict with the NLRA-provided cluster of remedies." As above set forth, *Dority* considered an action under the identical statutes, and for the identical alleged tort, as are involved in the case at bar.

Appellant recognizes the effect of the *Dority* decision and contends: "Dority is wrong and should be overruled." The trial court had the duty to follow the decision of our Supreme Court, and did so. This Court has the duty to follow the decision of our Supreme Court, and we now do so.

AFFIRMED.

ROBINSON, P.J. concurs; REYNOLDS, J. not participating.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Thursday, February 18, 1988

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

64,973 Presbyterian Hospital, Inc., an Oklahoma non-profit corporation et al. v. Board of Tax Roll Corrections, State of Oklahoma et al. Certiorari denied. COURT OF APPEALS' OPINION WITHDRAWN FROM OFFICIAL PUBLICATION.

VOTE ON DENIAL OF CERTIORARI:

CONCUR: Doolin, C.J., Hargrave, V.C.J., Hodges, Simms, Wilson, Kauger, JJ.

DISSENT: Lavender, Opala, Summers, JJ.

VOTE ON WITHDRAWAL FROM PUBLICATION:

CONCUR: Hargrave, V.C.J., Lavender, Opala,

DISSENT: Doolin, C.J., Hodges, Wilson, JJ.

65,216 Jimmy Alvin Rupe v. Frank Osborne, Lin Schreiber, Don Cook and Price Communications d/b/a United Radio Corporation. Certiorari denied. COURT OF APPEALS' OPINION WITHDRAWN FROM OFFICIAL PUBLICATION.

VOTE ON DENIAL OF CERTIORARI:

CONCUR: Doolin, C.J., Lavender, Opala, Wilson, Kauger, JJ.

DISSENT: Hargrave, V.C.J., Hodges, Simms, Summers, JJ.

VOTE ON WITHDRAWAL FROM PUBLICATION:

CONCUR: Hargrave, V.C.J., Hodges, Lavender, Simms, Opala, Kauger, Summers, JJ.
DISSENT: Doolin C.J., Wilson, J.

65,262 (consolidated with 65,275) Gladys Erixon v. Wal-Mart Stores, Inc. and Bruce C. Wright.
Certiorari denied.
CONCUR: Doolin, C.J., Hargrave, V.C.J., Hodges, Lavender, Simms, Summers, JJ.
DISSENT: Opala, Wilson, Kauger, JJ.

65,396 Jacqueline V. Pritzel and Arlie James Pritzel v. Bruce Wayne Palmer and Oklahoma Publishing Company.
Certiorari denied.

65,989 Pet, Inc. v. Anna Buckner.
Certiorari denied.
CONCUR: Doolin, C.J., Hodges, Lavender, Opala, Wilson, Kauger, JJ.
CONCUR BY REASON OF STARE DECISIS: Summers, J.
DISSENT: Hargrave, V.C.J., Simms, J.

66,082 Ron Ridley v. Kenneth Harrison and Jewell D. Harrison, husband and wife.
Certiorari denied.
CONCUR: Doolin, D.J., Hodges, Lavender, Simms, Opala, Wilson, Kauger, Summers, JJ.
NOT PARTICIPATING: Hargrave, V.C.J.

66,342 State of Oklahoma ex rel. Oklahoma Department of Agriculture v. Denise Brown and Oklahoma Ethics and Merit Commission.
Certiorari denied.

66,511 (consolidated with 66,249, 66,510) In the Matter of the Estate of H. W. (Harvey) Drain, Deceased. Beverly Jean Drain v. Clarence Drain and Togo Clark.
Certiorari denied.

/s/ Chief Justice Doolin

Supreme Court, U.S.
FILED
JUN 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1894

In The

Supreme Court of the United States

October Term, 1987

PET, INC.,

Petitioner,

vs.

ANNA M. BUCKNER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF PET, INC.

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June 16, 1988

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No. 87-1894

In The

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October Term, 1987

PET, INC.,

Petitioner,

vs.

ANNA M. BUCKNER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI OF PET, INC.

The Respondent objects to the Petitioner's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent was employed by the Petitioner at a manufacturing plant in Chickasha, Oklahoma. In 1981, her employment with the Petitioner was terminated because she filed a workers' compensation claim. On September 24, 1984, she received a jury verdict in her favor in the amount of $65,000.00, and was ordered reinstated to her former employment. The Petitioner appealed

this judgment to the Oklahoma Supreme Court on two grounds; (1) the trial court lacked subject matter jurisdiction; and (2) the Arbitration Award in favor of Pet was final and binding as to the parties. The judgment was affirmed on October 20, 1987, by the Court of Appeals of the State of Oklahoma. The opinion of the Oklahoma Court of Appeals was not published. Pet, Inc.'s petition to the Oklahoma Supreme Court for certiorari was denied on February 18, 1988.

JURISDICTION

The Petitioner has predicated jurisdiction in this action on 28 U.S.C. Section 1254(1).

STATEMENT OF FACTS

Pet, Inc.'s statement of facts contains a misstatement as to the reason for her termination. It was found, by a jury in this case, that Anna Buckner was terminated because she filed a workers' compensation claim. This finding was not appealed. The findings of the jury were undoubtedly influenced by the fact that there was available to the Respondent, at the time of trial, an intercompany memorandum stating, "It seems to me this could be one of our better test cases which, if we can win it in arbitration, would give others pause before filing claims." (Pf. Ex. 1). This memo was written in connection with the termination of Wanda McHugh, another employee terminated by the Petitioner. It shows that the

Petitioner was using physical inability to work as a pretext to intimidate other employees from making workers' compensation claims.

ARGUMENT

It might be inferred from Pet's statement of the case that the Respondent had not been able to return to work, following her injury; however, the contrary is true. The Respondent had been working actively in the plant for several months up to the time of her termination. The company's own doctor stated that she could continue working. (Def. Ex. 1, p.6).

This Court should not grant a writ of certiorari in this case. This case does not present any conflict between significant federal legislation and the laws of the State of Oklahoma. The issues raised in this case have previously been disposed of by the Tenth Circuit Court of Appeals in *Peabody Galion vs. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981).

The Petitioner contends that there is a possible conflict in this case with what may be the ruling in *Jonna R. Lingle vs. Norge Divn. of Magic Chef, Inc.*, No. 87-259. On June 6, 1988, this Court reversed *Lingle* and held that Federal Labor Law preemption did not apply. The difference between *Lingle* and the present action is that *Lingle* arose from a jurisdiction which did not have a statutorily created cause of action against retaliatory discharge comparable to 85 O.S. Sections 5,6, and 7.

In overruling the Court of Appeals, this Court stated:

> "In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for section 301 pre-emption purposes."

Pet, Inc., in this case, relies on the fact that an arbitrator made a decision that Pet, Inc. had "good cause" to discharge the Respondent under the collective bargaining agreement. They claim for this arbitrator's decision, a preclusive effect. However, there are reasons why the arbitration decision should not be given preclusive effect in this case. First, Anna Buckner did not have, at her disposal in the arbitration hearing, the discovery process which is available to her in the district court action. It was through this discovery process that she was able to obtain the damning inter company memorandum exposing Pet's true motive, in her discharge. Secondly, the Respondent as a member of a collective bargaining unit, did not have control of the arbitration proceedings since her union was her exclusive representative at the arbitration; and, third, the State of Oklahoma has a substantial interest as evidenced by their anti-retaliatory discharge statute in protecting the integrity of their court system by affording a more complete remedy. The State of Oklahoma, in order to protect its judicial system, has afforded the Respondent the full panoply of discovery and has afforded the Respondent remedies in terms of recovery for mental anguish and punitive damages, which are not available through arbitration.

Pet, Inc. argues that the arbitrator decided that the Respondent was physically unable to perform her assigned duties, which is not correct. The arbitrator decided that the employer, under the union contract, was the sole decision maker as far as ability to work was concerned. As previously mentioned, the company's doctor said she could work. The employer was permitted to make the decision as to ability to work without any supporting medical documentation and, in this case, made such a decision as a pretext to discharge the Respondent because of her workers' compensation claim.

The focus in the district court trial was not the union contract. It was the motivation for Pet's actions and the jury determined that the motivation was retaliation for filing a workers' compensation claim. This did not involve any consideration of the terms of the collective bargaining agreement. The issue at trial was not whether the Respondent was discharged for good cause, but whether she was discharged because she had exercised her rights under the Oklahoma Workers' Compensation Act. In order for Section 301 to preempt 85 O.S. Section 5, the Respondent's claim would have to be so "inextricably intertwined" with the collective bargaining agreement that it would be necessary for federal law to step in and define the contractual relationship between the parties via the arbitrator's interpretation of the collective bargaining agreement. *Allis-Chalmers Corp. vs. Lueck*, 105 S.Ct. 1904, at 1912 (1985). The Respondent's claim under 85 O.S. Section 5 is not based on a violation of the collective bargaining agreement. It is based on a "non-negotiable state law right on employers or employees." It

is independent of any right established by the collective bargaining agreement. This position is supported by the Tenth Circuit in its holding in *Peabody Galion vs. A.V. Dollar,* 666 F.2d 1309 (l0th Cir. 1981). As is pointed out in *Peabody,* supra, at page 1313:

> "At the outset we note that Oklahoma Statute Title 85 Sections 5-7 (Supp. 1980) is in its nature remote from the National Labor Relations Act and the collective bargaining agreement that was agreed upon between Peabody and the Union. The remedy which is being pursued by the plaintiffs in no way conflicts with the collective bargaining agreement or with the National Labor Relations Act. Thus, it cannot be said that this two sided action is preempted. The statute impedes neither collective bargaining nor any of the policies and purposes of the federal statutes."

This Court has been unwilling to declare preempted all local regulation that touches or concerns in any way the complex in the relationship between employees and unions. *See Sears Roebuck Co. vs. San Diego County District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745; *Farmer vs. United Brotherhood of Carpenters and Joiners of America,* 430 U.S. 290, 97 S.Ct. 1056.

As is pointed out in *Peabody,* supra at page 1315:

> "A state statute otherwise within the scope of *Garmon* will not be preempted if the conduct it regulates was a merely peripheral concern of the Labor Management Relations Act or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress had deprived the states of the power to act."

The Petitioner, in its brief, laments the fact that the Oklahoma Supreme Court in *Dority vs. Green Country*

Castings Corp., 726 P.2d 1355 (Okla. 1986), relied on the decision in *Peabody Galion vs. Dollar*, 666 F.2d 1309 (10th Cir. 1981), and did not properly apply *Allis-Chalmers vs. Lueck*, 471 U.S. 202 (1985) in its denial of the petitioner's request for certiorari. The Court in *Peabody* clearly addressed the tension between the preemption doctrine and the state's rights to control certain types of conduct. It is a misapplication of *Allis-Chalmers Corp. vs. Lueck*, supra, to assert that Section 301 voids the Oklahoma Workers' Compensation retaliatory discharge statute. The Court stated at page 1912:

> "Clearly, Section 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of Section 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

The Petitioner is asking this Court to give its stamp of approval to its illegal conduct. It is submitted that the Tenth Circuit's carefully reasoned opinion in *Peabody* anticipated this Court's analysis in *Allis-Chalmers vs. Lueck*. There is no conflict between Section 301 and the Oklahoma Anti-Retaliatory Discharge Statute.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should not issue in this action.

Respectfully submitted,

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